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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 GREGORY GENE LEWIS,  
12 Plaintiff,  
13 v.  
14 ORRY MARCIANO, et al.,  
15 Defendants.  
16

Case No. EDCV 17-0181 SVW (SS)

MEMORANDUM DECISION AND ORDER:

- (1) CONSTRUING "MOTION TO AMEND COMPLAINT" AS SECOND AMENDED COMPLAINT (Dkt. No. 7); AND  
(2) DISMISSING SECOND AMENDED COMPLAINT WITH LEAVE TO AMEND<sup>1</sup>

17  
18 I.

19 INTRODUCTION  
20

21 On August 21, 2017, Plaintiff, a California state prisoner  
22 proceeding pro se, filed a document titled "Motion to Amend  
23 Complaint with Leave to Clarify" in the above-captioned civil  
24 rights action. ("August 21 Motion," Dkt. No. 7). For the reasons  
25 stated below, the Court construes the August 21 Motion as a Second  
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27 <sup>1</sup> A magistrate judge may dismiss a complaint with leave to amend  
28 without the approval of a district judge. See McKeever v. Block,  
932 F.2d 795, 798 (9th Cir. 1991).

1 Amended Complaint, and, so construed, DISMISSES the Second Amended  
2 Complaint with leave to amend.

3  
4 Congress mandates that district courts perform an initial  
5 screening of complaints in civil actions where a prisoner seeks  
6 redress from a governmental entity or employee. 28 U.S.C.  
7 § 1915A(a). This Court may dismiss such a complaint, or any  
8 portion, before service of process if it concludes that the  
9 complaint (1) is frivolous or malicious, (2) fails to state a claim  
10 upon which relief can be granted, or (3) seeks monetary relief from  
11 a defendant who is immune from such relief. 28 U.S.C. § 1915A(b) (1-  
12 2); see also Lopez v. Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir.  
13 2000) (en banc).

## 14 15 II.

### 16 PRIOR PROCEEDINGS

17  
18 On February 1, 2017, Plaintiff filed a civil complaint under  
19 the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.;  
20 the Civil Rights Act, 42 U.S.C. § 1983; and the California  
21 Government Claims Act, Cal. Gov't Code §§ 905 et seq.  
22 ("Complaint," Dkt. No. 1). The Complaint sued three Chuckawalla  
23 Valley State Prison ("CVSP") employees: Orry Marciano, a  
24 "physician assistant/primary care physician"; Ms. Beatres, a  
25 nurse; and Kimberly Seibel, the warden. (Id. at 3). The Complaint  
26 vaguely alleged that Marciano, Beatres, and Seibel violated  
27 Plaintiff's rights by, among other things, refusing to return his  
28 cane; failing to intervene in his work assignment as a kitchen

1   lineback, which required him to carry heavy pans and trays and push  
2   heavy carts; and failing to provide medical care both before and  
3   after he suffered a mild stroke and heart failure. (Id. at 5-6).  
4

5       On July 7, 2017, the Court dismissed the Complaint with leave  
6   to amend due to pleading defects. ("ODLA," Dkt. No. 5). The  
7   Court's Order required Plaintiff to file a First Amended Complaint  
8   correcting the deficiencies in the original Complaint within thirty  
9   days if he wished to pursue this action. (Id. at 18).  
10

11       On July 27, 2017, Plaintiff submitted two documents to the  
12   Court: (1) a Notice of Dismissal stating that "only Defendants"  
13   are dismissed from the Complaint (the "July 27 Dismissal Notice,"  
14   Dkt. No. 9),<sup>2</sup> and (2) a civil complaint bearing the caption and  
15   case number of the instant case. ("July 27 Complaint," Dkt. No.  
16   11). This pleading once again purported to raise claims under the  
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18   <sup>2</sup> The July 27 Dismissal Notice did not identify the Defendants to  
19   be dismissed by name and appeared incomplete. While Plaintiff's  
20   intent in filing the Notice is somewhat unclear, to the extent that  
21   Plaintiff was attempting to "dismiss" Defendants named in the  
22   original Complaint who were not named in subsequent pleadings, the  
23   Notice was unnecessary and confusing.

24   The filing of an amended complaint supersedes, i.e., entirely  
25   supplants or replaces, the original or any prior complaint, which  
26   is "treated thereafter as nonexistent." Ramirez v. County of San  
27   Bernardino, 806 F.2d 1002, 1008 (9th Cir. 2015) (internal quotation  
28   marks and citation omitted); see also Charles Alan Wright, et al.,  
6 Fed. Prac. & Proc. Civ. § 1476 (3d ed. 2016 update) ("Once an  
amended pleading is interposed, the original pleading no longer  
performs any function in the case and any subsequent motion made  
by an opposing party should be directed at the amended pleading.")  
(footnotes omitted). Therefore, defendants named in an original  
complaint who are not named in a first amended or subsequent  
complaint are deemed "dismissed" from the case without further  
action.

1 ADA and section 1983, but against an entirely different set of CVSP  
2 employees. The July 27 Complaint sued five CVSP employees, none  
3 of whom were sued in the original Complaint: Mr. Verduzco and  
4 Mr. Vengocher, both "chief cooks"; Mr. Perez and Ms. Prieta, both  
5 supervisors; and Dr. Lee, the chief medical doctor. Plaintiff  
6 claimed that Verduzco and Vengocher improperly required him to  
7 leave his cane and disability vest in their office when he worked  
8 in the kitchen; that Perez and Prieta knew that he was required to  
9 give up his cane and vest while working; and that Lee denied his  
10 request for seizure medication. (Id. at 3-4).

11  
12 However, the July 27 Complaint also included references to  
13 the original Complaint and its Defendants. In light of the  
14 ambiguities on the face of the July 27 Complaint, the Court issued  
15 an "Order Requiring Clarification" in which it ordered Plaintiff  
16 to inform the Court whether he intended the July 27 Complaint to  
17 (1) supplement the original Complaint, (2) supersede the original  
18 Complaint, or (3) open an entirely new action. ("Clarification  
19 Order," Dkt. No. 7).

20  
21 In response to the Clarification Order, though not directly  
22 addressing it, on August 21, 2017, Plaintiff filed the instant  
23 August 21 Motion. Although captioned as a "motion," the filing  
24 contains no argument or requests. Instead, it appears to be another  
25 attempt to amend the pleading, as it includes a statement of  
26 jurisdiction, a list of Defendants, a statement of facts, a  
27 recitation of "legal claims," and a prayer for damages. The  
28 allegations in the August 21 Motion purport to sue six CVSP

1 employees, some of whom, but not all, were sued in one or the other  
2 of the prior versions of Plaintiff's claims, i.e., staff cooks  
3 Viengochia and Verdusco<sup>3</sup> and supervisors Perez and Prieta (all of  
4 whom were named in the July 27 Complaint, but not the original  
5 Complaint); Marciano (who was named in the original Complaint, but  
6 not the July 27 Complaint); and correctional officer Moreno, named  
7 for the first time, whom Plaintiff alleges is in charge of the  
8 safety and security of the C facility kitchen. (August 21 Motion  
9 at 1-2). The August 21 Motion abandons the claims against Lee in  
10 the July 27 Complaint and the claims against Beatres and Seibel in  
11 the original Complaint.

12  
13 Based upon the evolution of Plaintiff's claims, and the fact  
14 that some, but not all, of the Defendants in the original Complaint  
15 and the July 27 Complaint have been named in the most recent  
16 iteration of the claims, it appears that Plaintiff intended for  
17 the July 27 Complaint to be the First Amended Complaint in this  
18 matter, and for the August 21 Motion to be the Second Amended  
19 Complaint. The Court has separately ordered that the July 27  
20 Complaint be filed as the First Amended Complaint. (See Dkt. No.  
21 10). The Court now construes the "August 21 Motion" (Dkt. No. 7)  
22 as the Second Amended Complaint and DIRECTS the Court Clerk to re-  
23 file that document in a separate docket entry as the Second Amended  
24 Complaint.<sup>4</sup> Accordingly, the Second Amended Complaint supersedes

25  
26 <sup>3</sup> The Court presumes that Defendants "Viengochia" and "Verdusco"  
27 in the August 21 Motion are Defendants "Vengocher" and "Verduzco"  
in the July 27 Complaint.

28 <sup>4</sup> For the remainder of this Order, the Court will refer to the  
"August 21 Motion" as the "Second Amended Complaint" or "SAC."

1 both the original Complaint and the First Amended Complaint, and  
2 is the current operative pleading.

### 3 4 **III.**

#### 5 **ALLEGATIONS OF THE SECOND AMENDED COMPLAINT**

6  
7 As noted above, the Second Amended Complaint sues six CVSP  
8 employees: "staff supervisor cooks" Viengochia and Verdusco;  
9 "supervisor II cooks" Perez and Prieta, who supervise Viengochia  
10 and Verdusco; health care provider Marciano; and correctional  
11 officer Moreno. (SAC at 1-2). All Defendants are sued in both  
12 their individual and official capacities. (Id. at 3).

13  
14 Plaintiff alleges that he is "mobility impaired" because his  
15 right leg is shorter than his left leg, and his left leg "sometimes  
16 gives out on [him]," (id.), which leaves him with a "severe  
17 a[b]normal limp." (Id. at 5). Plaintiff states that when he  
18 reported to work on December 10, 2015 with his "mobility impaired  
19 lime green vest and cane," Viengochia asked him what was "wrong"  
20 with him. (Id. at 3). Viengochia told Plaintiff that if he refused  
21 to work, he would issue a Rules Violation Report for failure to  
22 work at his assigned duties. (Id.). Plaintiff told Viengochia  
23 that he "wanted no problems and could not afford any disciplinary  
24 infractions." (Id.). Viengochia assigned Plaintiff to "pots and  
25 pans," which required him to stand for six or seven hours. (Id.).  
26 Viengochia allowed Plaintiff to sit on a "chair" made out of milk  
27 crates, but nonetheless confiscated his cane, as he did on a daily  
28

1 basis for four months. (Id.). However, Viengochia allowed  
2 Plaintiff to pick up his cane at the end of the shift. (Id.).  
3

4 When Verdusco filled in for Viengochia, he, too, would take  
5 away Plaintiff's cane every day, and return it to him at the end  
6 of the shift. (Id. at 4-5). Verdusco made verbal threats that he  
7 would write Plaintiff up in a disciplinary report if Plaintiff  
8 missed work or failed to comply with a "direct order." (Id. at  
9 4). Verdusco, like Viengochia, knew that Plaintiff was mobility  
10 impaired because he had seen Plaintiff in his vest. (Id.).  
11

12 Perez and Prieta are in "charge of the overall functions of  
13 the culinary kitchens" at CVSP. (Id. at 5). They check in daily  
14 on the "functions and operations" managed by their "cook  
15 supervisors," and have daily meetings with them. (Id.). Both  
16 Perez and Prieta saw Plaintiff and inquired about him. (Id.).  
17

18 Moreno is in charge of the security of the C facility kitchen.  
19 (Id. at 6). He was aware of Plaintiff's "mobility impairment" vest  
20 and cane, but nonetheless condoned Viengochia's and Verdusco's  
21 actions "by allowing them to do as they please[d]" with Plaintiff.  
22 (Id.).  
23

24 From the date of Plaintiff's initial medical consultation at  
25 CVSP, Marciano knew of Plaintiff's medical history, including his  
26 limp, his medical vest and cane, and his "chronos for lower  
27 bed/lower tier." (Id. at 6-7). Marciano also knew that Plaintiff  
28 "used to take sei[z]ure medication." (Id. at 6). Plaintiff asked

1 for Marciano's help in getting him out of his kitchen assignment,  
2 but Marciano "did nothing for [him] even after . . . [he] had a  
3 mild stroke while at work in the kitchen." (Id. at 7). Plaintiff  
4 was sent to the hospital by ambulance on January 10, 2016 because  
5 he was suffering from chest pains. (Id. at n.4).

6  
7 Plaintiff alleges that "he was denied equal protection of the  
8 law" because of his race and mobility disability. (Id. at 8).  
9 Plaintiff further claims that he suffered physical pain and "mental  
10 anguish" for "well over four months" by being "forced to work  
11 beyond [his] means" in violation of Eighth and Fourteenth Amendment  
12 rights. (Id. at 8-9). Plaintiff seeks punitive damages of \$20,000  
13 from each Defendant, and "compensatory damages from each defendant  
14 for the sum of \$1,000,000 each." (Id. at 8). Plaintiff "further  
15 seeks nominal damages for mental anguish from each defendant for  
16 the sum of \$20,000 each." (Id. at 9).

#### 17 18 **IV.**

#### 19 **DISCUSSION**

20  
21 Under 28 U.S.C. section 1915A(b), the Court must dismiss  
22 Plaintiff's Second Amended Complaint due to multiple pleading  
23 defects. However, the Court must grant a pro se litigant leave to  
24 amend his defective complaint unless "it is absolutely clear that  
25 the deficiencies of the complaint could not be cured by amendment."  
26 Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation and  
27 internal quotation marks omitted). Accordingly, for the reasons  
28



1 stated below, the Second Amended Complaint is DISMISSED with leave  
2 to amend.

3  
4 **A. The Second Amended Complaint Violates Federal Rule Of Civil**  
5 **Procedure 8**

6  
7 Federal Rule of Civil Procedure 8 requires that a complaint  
8 contain “‘a short and plain statement of the claim showing that  
9 the pleader is entitled to relief’ in order to ‘give the defendant  
10 fair notice of what the . . . claim is and the grounds upon which  
11 it rests.’” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).  
12 Each claim must be simple, concise, and direct. Fed. R. Civ. P.  
13 8(d)(1). Rule 8 can be violated when “too much” or “too little”  
14 is said. Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013).  
15

16 Here, the Second Amended Complaint does not comply with Rule  
17 8. Although the “factual allegations” in the Second Amended  
18 Complaint against each of the six Defendants are concise and  
19 clearly organized, they are extremely vague and conclusory. The  
20 allegations do not explain which acts by which Defendants violated  
21 which particular federal constitutional rights. For example,  
22 although Plaintiff summarily claims that his due process rights  
23 were violated, he does not state whether he is bringing a due  
24 process claim against each of the six Defendants, or just one or  
25 some of them. Nor does he explain what process he believes he was  
26 due, or identify what each of the Defendants separately did to  
27 violate his due process rights. The complaint fails to provide  
28 Defendants with fair notice of the claims in a short, clear and

1 concise statement. See Twombly, 550 U.S. at 555. Accordingly,  
2 the Second Amended Complaint is dismissed, with leave to amend.

3  
4 Dismissal is appropriate based solely on Plaintiff's failure  
5 to comply with Rule 8. However, to the extent that the Court is  
6 able to discern claims that Plaintiff may be attempting to raise,  
7 the Court reviews these claims and the relevant law below.

8  
9 **B. Plaintiff's Official Capacity Claims Are Defective**

10  
11 Plaintiff sues Defendants for damages in both their official  
12 and individual capacities. (SAC at 3). However, Plaintiff's  
13 official capacity claims are barred by the Eleventh Amendment and  
14 cannot proceed.

15  
16 Pursuant to the Eleventh Amendment, states are immune from  
17 suits for damages under section 1983. See Howlett v. Rose, 496  
18 U.S. 356, 365 (1990); Brown v. Cal. Dep't of Corr., 554 F.3d 747,  
19 752 (9th Cir. 2009) ("California has not waived its Eleventh  
20 Amendment immunity with respect to claims brought under § 1983 in  
21 federal court."). "[A] suit against a state official in his or  
22 her official capacity . . . is no different from a suit against  
23 the State itself." Flint v. Dennison, 488 F.3d 816, 824-25 (9th  
24 Cir. 2007) (citation omitted). Therefore, state employees sued  
25 for damages in their official capacity are generally entitled to  
26 immunity. Id. at 825. However, a plaintiff may seek monetary  
27 damages under section 1983 from state employees in their individual  
28 capacity. See Adler v. Lewis, 675 F.2d 1085, 1098 (9th Cir. 1982)

1 ("State officials must be sued in their individual capacity in an  
2 action for monetary damages.").

3  
4 Here, the Second Amended Complaint prays for monetary damages  
5 only, a remedy Plaintiff cannot obtain from state employees in  
6 their official capacity. (SAC at 8-9). Thus, to the extent that  
7 Plaintiff is seeking only monetary damages in this action, the  
8 official capacity claims are defective and must be dismissed.

9  
10 **C. Plaintiff Fails To State An Equal Protection Claim**

11  
12 The Equal Protection Clause broadly requires the government  
13 to treat similarly situated people equally. Hartman v. California  
14 Dep't of Corr. and Rehabilitation, 707 F.3d 1114, 1123 (9th Cir.  
15 2013). To state an equal protection claim, typically a plaintiff  
16 must allege that "'defendants acted with an intent or purpose to  
17 discriminate against [him] based upon membership in a protected  
18 class,'" such as a particular race or religion. Furnace v.  
19 Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013) (quoting Barren v.  
20 Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)). "Intentional  
21 discrimination means that a defendant acted at least in part  
22 because of a plaintiff's protected status." Serrano v. Francis,  
23 345 F.3d 1071, 1082 (9th Cir. 2003) (internal quotation marks and  
24 citation omitted) (emphasis in original); see also Byrd v. Maricopa  
25 Cnty. Sheriff's Dep't, 565 F.3d 1205, 1212 (9th Cir. 2009) (to  
26 state an equal protection claim, plaintiff "must plead intentional  
27 unlawful discrimination or allege facts that are at least  
28 susceptible of an inference of discriminatory intent").

1       Where the governmental classification does not involve a  
2 suspect or protected class, or impinge upon a fundamental right,  
3 the classification will not “run afoul of the Equal Protection  
4 Clause if there is a rational relationship between disparity of  
5 treatment and some legitimate governmental purpose.” Nurre v.  
6 Whitehead, 580 F.3d 1067, 1098 (9th Cir. 2009) (quoting Cent. State  
7 Univ. v. Am. Ass’n of Univ. Professors, 526 U.S. 124, 127–28  
8 (1999)). “Although disabled people do not constitute a suspect  
9 class, the Equal Protection Clause [nonetheless] prohibits  
10 irrational and invidious discrimination against them.” Dare v.  
11 California, 191 F.3d 1167, 1174 (9th Cir. 1999). However, “a  
12 governmental policy that purposefully treats the disabled  
13 differently from the non-disabled need only be rationally related  
14 to legitimate legislative goals to pass constitutional muster.”  
15 Martin v. California Dep’t of Veterans Affairs, 560 F.3d 1042,  
16 1049–50 (9th Cir. 2009) (internal quotation marks and citation  
17 omitted).

18  
19       Courts have also recognized equal protection claims brought  
20 by a “class of one” where the plaintiff alleges that he or she has  
21 been intentionally treated differently from others similarly  
22 situated and that there is no rational basis for the difference in  
23 treatment. See Village of Willowbrook v. Olech, 528 U.S. 562, 564  
24 (2000). A “class-of-one” equal protection claim must generally  
25 show that the difference in treatment resulted from non-  
26 discretionary state action. See Engquist v. Oregon Dep’t of  
27 Agriculture, 553 U.S. 591 (2008). As the Supreme Court explained,  
28

1       There are some forms of state action . . . which by their  
2       nature involve discretionary decisionmaking based on a  
3       vast array of subjective, individualized assessments.  
4       In such cases the rule that people should be "treated  
5       alike, under like circumstances and conditions" is not  
6       violated when one person is treated differently from  
7       others, because treating like individuals differently is  
8       an accepted consequence of the discretion granted. In  
9       such situations, allowing a challenge based on the  
10      arbitrary singling out of a particular person would  
11      undermine the very discretion that such state officials  
12      are entrusted to exercise.

13  
14      Id. at 603 (explaining that the equal protection clause would not  
15      prohibit an officer from issuing a speeding ticket to one person  
16      and not others even for no discernable reason unless the decision  
17      to cite was based on the speeder's membership in a protected class);  
18      see also Towery v. Brewer, 672 F.3d 650, 660 (9th Cir. 2012) (the  
19      "class-of-one doctrine" does not apply to "forms of state action  
20      that involve discretionary decisionmaking"); Kansas Penn Gaming,  
21      LLC v. Collins, 656 F.3d 1210, 1216 (10th Cir. 2011) (observing  
22      that successful "class of one" equal protection claims typically  
23      "have arisen from unfavorable zoning decisions, withholding of  
24      permits, and selective regulatory enforcement") (internal citation  
25      omitted).

26  
27      Liberally construed, the Second Amended Complaint identifies  
28      two bases for Plaintiff's equal protection claims: his race and

1 his disability. (Id. at 8). However, the Second Amended Complaint  
2 contains absolutely no facts showing that Plaintiff was  
3 discriminated against because of his race -- in fact, it does not  
4 even identify Plaintiff's race. While Plaintiff does allege some  
5 facts relating to his disability, it is unclear whether he is  
6 contending that he was discriminated against because he is  
7 disabled, and disabled prisoners as a class are treated differently  
8 than able-bodied prisoners with no rational justification for the  
9 difference, or that Plaintiff, as a "class of one," was  
10 irrationally treated differently than other disabled or able-bodied  
11 prisoners in some non-discretionary state action. If Plaintiff  
12 wishes to pursue an equal protection claim, he must allege facts  
13 showing his membership in an identifiable group and clearly  
14 identify which acts he contends constitute discrimination, and who  
15 committed them. Accordingly, the Second Amended Complaint is  
16 dismissed, with leave to amend.

17  
18 **D. Plaintiff Fails To State A Due Process Claim**

19  
20 The Fourteenth Amendment provides that the State shall not  
21 "deprive any person of life, liberty or property, without due  
22 process of the law." U.S. Const. amend. XIV, § 1. To state a  
23 substantive due process claim, a plaintiff must allege that a state  
24 actor deprived him "of life, liberty, or property in such a way  
25 that 'shocks the conscience' or 'interferes with rights implicit  
26 in the concept of ordered liberty.'" Corales v. Bennett, 567 F.3d  
27 554, 568 (9th Cir. 2009) (quoting United States v. Salerno, 481  
28 U.S. 739, 746 (1987)); Resnick v. Hayes, 213 F.3d 443, 447 (9th

1 Cir. 2000) (same). To state a procedural due process claim, a  
2 plaintiff must demonstrate that he was denied substantive due  
3 process, then show that the procedures attendant upon the  
4 deprivation were constitutionally insufficient. Ky. Dep't of Corr.  
5 v. Thompson, 490 U.S. 454, 459-60 (1989).

6  
7 Similar to the deficiencies in Plaintiff's equal protection  
8 claim, it is unclear whether Plaintiff is asserting a due process  
9 claim against all, or just one or some, of the Defendants; what  
10 liberty or property interest Plaintiff claims to have been  
11 violated; whether Plaintiff is attempting to allege a substantive  
12 or procedural due process violation, or both; and what,  
13 specifically, Plaintiff believes each Defendant did to violate his  
14 due process rights. Accordingly, the Second Amended Complaint is  
15 dismissed, with leave to amend.

16  
17 **E. Plaintiff Fails To State A Deliberate Indifference Claim**

18  
19 To state an Eighth Amendment claim based on a prisoner's  
20 medical treatment, the prisoner must demonstrate that the defendant  
21 was "deliberately indifferent" to his "serious medical needs."  
22 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also West  
23 v. Atkins, 487 U.S. 42, 49 (1988). To establish a "serious medical  
24 need," the prisoner must demonstrate that "failure to treat a  
25 prisoner's condition could result in further significant injury or  
26 the 'unnecessary and wanton infliction of pain.'" Jett, 439 F.3d  
27 at 1096 (citation omitted); see also Morgan v. Morgensen, 465 F.3d  
28

1 1041, 1045 (9th Cir. 2006) (the existence of a serious medical need  
2 is determined by an objective standard).

3  
4 To establish "deliberate indifference" to such a need, the  
5 prisoner must demonstrate: "(a) a purposeful act or failure to  
6 respond to a prisoner's pain or possible medical need, and (b) harm  
7 caused by the indifference." Id. Deliberate indifference "may  
8 appear when prison officials deny, delay or intentionally interfere  
9 with medical treatment, or it may be shown by the way in which  
10 prison physicians provide medical care." Id. (citations  
11 omitted). The defendant must have been subjectively aware of a  
12 serious risk of harm and must have consciously disregarded that  
13 risk. See Farmer v. Brennan, 511 U.S. 825, 845 (1994).

14  
15 "[A] plaintiff's showing of nothing more than a difference  
16 of medical opinion as to the need to pursue one course of treatment  
17 over another [is] insufficient, as a matter of law, to establish  
18 deliberate indifference.'" Wilhelm v. Rotman, 680 F.3d 1113, 1122  
19 (9th Cir. 2012) (quoting Jackson v. McIntosh, 90 F.3d 330, 332 (9th  
20 Cir. 1996)); see also Hamby v. Hammond, 821 F.3d 1085, 1092 (9th  
21 Cir. 2016) ("[A] difference of opinion between a physician and the  
22 prisoner -- or between medical professionals -- concerning what  
23 medical care is appropriate does not amount to deliberate  
24 indifference.") (quoting Snow v. McDaniel, 681 F.3d 978, 987 (9th  
25 Cir. 2012), overruled in part on other grounds by Peralta v.  
26 Dillard, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc)). Where a  
27 physician defendant opts for one course of treatment over another,  
28 or for no affirmative treatment at all, the plaintiff must show



1 that the option the physician chose was medically unacceptable  
2 under the circumstances, and that the physician chose it in  
3 conscious disregard of an excessive risk to the plaintiff's health.  
4 Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004).

5  
6 Although the SAC does not identify the specific Defendants  
7 against whom Plaintiff may be attempting to assert a deliberate  
8 indifference claim, the Court presumes that the list includes, at  
9 a minimum, Marciano. Plaintiff alleges that Marciano was aware of  
10 his medical history and condition, but nonetheless failed to  
11 intervene when Plaintiff asked him for "medical help to get out of  
12 [his] assignment" in the C facility kitchen. These spare  
13 allegations fail to state a deliberate indifference claim. First,  
14 it is not clear from the SAC that Plaintiff has or had a serious  
15 medical condition. Plaintiff does not allege any facts showing  
16 why his limp was so serious that the failure to exempt him from  
17 kitchen detail would likely result in significant additional injury  
18 or the unnecessary and wanton infliction of pain. Second,  
19 Plaintiff does not allege facts showing that Marciano's failure to  
20 exempt Plaintiff from his kitchen assignment was "medically  
21 unacceptable" and was "chosen in conscious disregard of an  
22 excessive risk" to Plaintiff's health. Hamby, 821 F.3d at 1092  
23 (internal quotation marks and citation omitted).

24  
25 Third, even though Plaintiff alleges that he suffered mental  
26 anxiety from being required to work in the kitchen, this allegation  
27 fails to show the "harm" necessary for a deliberate indifference  
28 claim because "an inmate may not pursue an emotional distress

1 injury unless accompanied by a physical injury" that is more than  
2 "de minimus." Wood v. Idaho Dep't of Corr., 391 F. Supp. 2d 852,  
3 867 (D. Idaho 2005); 42 U.S.C. § 1997e(e); Oliver v. Keller, 289  
4 F.3d 623, 629 (9th Cir. 2002) (pretrial detainee failed to state  
5 deliberate indifference claim for "mental and emotional injury"  
6 where the only physical injuries alleged were a canker sore and  
7 back and leg pain). Plaintiff does not sufficiently describe any  
8 plausible physical pain he may have endured as a consequence of  
9 his job. Indeed, Plaintiff admits that he was allowed to sit on a  
10 makeshift chair while working, and that his cane was returned to  
11 him at the end of every shift. Accordingly, the Second Amended  
12 Complaint is dismissed, with leave to amend.

13  
14 **F. Plaintiff Fails To State A Cruel And Unusual Punishment Claim**

15  
16 Alternatively, it is possible that Plaintiff's Eighth  
17 Amendment claim is based on the contention that his work assignment  
18 as a kitchen lineman constitutes "cruel and unusual punishment"  
19 because it requires him to lift heavy trays and pans and push heavy  
20 carts. This ground for an Eighth Amendment claim also fails.

21  
22 Infliction of suffering on prisoners that is "totally without  
23 penological justification" violates the Eighth Amendment. Rhodes  
24 v. Chapman, 452 U.S. 337, 346 (1981). Only "the unnecessary and  
25 wanton infliction of pain . . . constitutes cruel and unusual  
26 punishment forbidden by the Eighth Amendment." Whitley v. Albers,  
27 475 U.S. 312, 319 (1986) (internal quotation marks and citation  
28 omitted). The punishment must constitute "shocking and barbarous

1 treatment." Grummett v. Rushen, 779 F.2d 491, 494 n.1 (9th Cir.  
2 1985). "To be cruel and unusual punishment, conduct that does not  
3 purport to be punishment at all must involve more than ordinary  
4 lack of due care for the prisoner's interests or safety." Whitley,  
5 475 U.S. at 319. "It is obduracy and wantonness, not inadvertence  
6 or error in good faith, that characterize the conduct prohibited  
7 by the Cruel and Unusual Punishments Clause . . . ." Wilson v.  
8 Seiter, 501 U.S. 294, 299 (1991) (internal quotation marks and  
9 citation omitted). Accordingly, "courts considering a prisoner's  
10 [cruel and unusual punishment] claim must ask: 1) if the officials  
11 acted with a sufficiently culpable state of mind; and 2) if the  
12 alleged wrongdoing was objectively harmful enough to establish a  
13 constitutional violation." Somers v. Thurman, 109 F.3d 614, 622  
14 (9th Cir. 1997) (citing Hudson v. McMillian, 503 U.S. 1, 8 (1992)).  
15

16 The Second Amended Complaint simply does not provide any facts  
17 about Plaintiff's work detail, or his alleged inability to perform  
18 the tasks required of him, to establish that requiring him to work  
19 as a kitchen lineman was "shocking and barbarous treatment" with  
20 no penological justification. Additionally, as with the SAC's  
21 other claims, the SAC does not identify which Defendants allegedly  
22 violated Plaintiff's Eighth Amendment rights, or explain why each  
23 one is individually liable for any pain Plaintiff suffered as a  
24 consequence of his job. Accordingly, the Second Amended Complaint  
25 is dismissed, with leave to amend.

26 \\  
27 \\  
28 \\  
29

1 **G. Plaintiff Fails To State A Claim Against The Supervisory**  
2 **Defendants**

3  
4 To demonstrate a civil rights action against a government  
5 official, a plaintiff must show either the official's direct,  
6 personal participation in the harm, or some sufficiently direct  
7 connection between the official's conduct and the alleged  
8 constitutional violation. See Starr v. Baca, 652 F.3d 1202, 1205-  
9 06 (9th Cir. 2011). A supervising officer must personally take  
10 some action against the plaintiff or "set in motion a series of  
11 acts by others . . . which [s]he knew or reasonably should have  
12 known, would cause others to inflict the constitutional injury" on  
13 the plaintiff. Larez v. City of Los Angeles, 946 F.2d 630, 646  
14 (9th Cir. 1991) (internal quotations omitted). Government  
15 officials may not be held liable for the unconstitutional conduct  
16 of their subordinates. See Ashcroft v. Iqbal, 556 U.S. 662, 676  
17 (2009). Rather, a supervisor may be held accountable only "for  
18 his own culpable action or inaction in the training, supervision,  
19 or control of his subordinates, for his acquiescence in the  
20 constitutional deprivations of which the complaint is made, or for  
21 conduct that showed a reckless or callous indifference to the  
22 rights of others." Preschooler II v. Clark County Bd. of Trustees,  
23 479 F.3d 1175, 1183 (9th Cir. 2007).

24  
25 The SAC fails to state a supervisory claim against Perez,  
26 Prieta or Moreno. Plaintiff merely alleges that Perez and Prieta,  
27 who supervised Viengochia and Verdusco, "saw" Plaintiff with his  
28 vest and cane and "inquired" about him. (Id. at 5). Making an

1 inquiry about a prisoner does not, by itself, show a violation of  
2 the prisoner's constitutional rights. Plaintiff appears to imply  
3 that because Perez and Prieta supervise Viengochia and Verdusco,  
4 they should be responsible for their subordinates' actions.  
5 However, liability under section 1983 arises only for acts  
6 committed by each Defendant personally. A supervisor is not liable  
7 merely because a subordinate violated a plaintiff's constitutional  
8 rights.

9  
10 Plaintiff further alleges that Moreno, who was "in charge of  
11 the safety and security of the 'C' facility kitchen" where  
12 Plaintiff worked, "condoned" Viengochia's and Verdusco's actions  
13 toward Plaintiff because he knew what they were doing but still  
14 allowed them to "do what they pleased." (Id. at 6). However, the  
15 only facts alleged against Viengochia and Verdusco are that they  
16 confiscated Plaintiff's cane, which they returned to him at the  
17 end of his shift. Even if Moreno's responsibilities for the "safety  
18 and security" of the C facility kitchen authorized him to intervene  
19 in individual work assignments, which Plaintiff does not allege  
20 and which seems questionable, Plaintiff has not explained why  
21 confiscating his cane presented a security threat. Accordingly,  
22 the Second Amended Complaint is dismissed, with leave to amend.

#### 23 24 **IV.**

#### 25 **CONCLUSION**

26  
27 For the reasons stated above, the Second Amended Complaint is  
28 dismissed with leave to amend. If Plaintiff still wishes to pursue

1 this action, he is granted **thirty (30) days** from the date of this  
2 Memorandum and Order within which to file a Third Amended  
3 Complaint. In any amended complaint, Plaintiff shall **cure the**  
4 **defects** described above. **Plaintiff shall not include new**  
5 **defendants or new allegations that are not reasonably related to**  
6 **the claims asserted in the SAC.** The Third Amended Complaint, if  
7 any, shall be complete in itself and shall not refer in any manner  
8 to the original complaint, the First Amended Complaint, or the  
9 Second Amended Complaint. Its caption page shall bear the  
10 designation "Third Amended Complaint" and the case number assigned  
11 to this action. **If Plaintiff chooses to pursue this action, he**  
12 **shall not file the Third Amended Complaint as a "motion," but shall**  
13 **simply caption the document as the "Third Amended Complaint."**  
14

15 The Third Amended Complaint should be short and concise. In  
16 any amended complaint, Plaintiff should confine his allegations to  
17 those operative facts supporting each of his claims. Plaintiff is  
18 advised that pursuant to Federal Rule of Civil Procedure 8(a), all  
19 that is required is a "short and plain statement of the claim  
20 showing that the pleader is entitled to relief." **Plaintiff is**  
21 **strongly encouraged to utilize the standard civil rights complaint**  
22 **form when filing any amended complaint, a copy of which is attached.**  
23 In any amended complaint, Plaintiff should identify the nature of  
24 each separate legal claim and the Defendant (by name) against whom  
25 the claim is asserted, and make clear what specific factual  
26 allegations support each separate claim. Plaintiff is strongly  
27 encouraged to keep his statements concise and to omit irrelevant  
28

1 details. It is not necessary for Plaintiff to cite case law or  
2 include legal argument.

3  
4 Plaintiff is explicitly cautioned that failure to timely file  
5 a Third Amended Complaint, or failure to correct the deficiencies  
6 described above, will result in a recommendation that this action  
7 be dismissed with prejudice for failure to prosecute and obey Court  
8 orders pursuant to Federal Rule of Civil Procedure 41(b).  
9 Plaintiff is further advised that if he no longer wishes to pursue  
10 this action, he may voluntarily dismiss it by filing a Notice of  
11 Dismissal in accordance with Federal Rule of Civil Procedure  
12 41(a)(1). A form Notice of Dismissal is attached for Plaintiffs'  
13 convenience. If Plaintiff utilizes the Notice of Dismissal, he is  
14 instructed to clearly state whether he is dismissing the entire  
15 action or only certain claims or certain Defendants.

16  
17 DATED: September 18, 2017

18  
19 /s/  
20 SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

21  
22 THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS,  
23 WESTLAW OR ANY OTHER LEGAL DATABASE.